IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 37 of 1999

For Approval and Signature:

HONOURABLE MR.JUSTICE R.P.DHOLAKIA :

HONOURABLE MR.JUSTICE KS JHAVERI :

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge

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HIRABHAI TULSIBHAI GOSWAMI - Appellant(s)
Versus
STATE OF GUJARAT & 1 - Opponent(s)

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Appearance :
THROUGH JAIL for Appellant(s) : 1, Mr CHIRAG PAWAR for Appellant(s) : 1,
MR HL JANI APP for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE R.P.DHOLAKIA

and

HONOURABLE MR.JUSTICE KS JHAVERI

Date : 14/09/2007

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE R.P.DHOLAKIA)

1.0 This appeal is directed against the judgment and order dated 26.11.1998 passed by the learned Addl. City Sessions Judge, Court No. 25, Ahmedabad in Sessions Case No. 224 of 1997 whereby, the appellant was convicted for offences punishable u/s. 302 of Indian Penal Code (for short, "the IPC") and Section 135(1) of the Bombay Police Act (for short, "the BP Act"). For conviction u/s. 302 of IPC, the appellant was sentenced to undergo Rigorous Imprisonment for life with fine of Rs.500/- and in default of payment of fine, further Rigorous Imprisonment for a period of one year, while for conviction u/s. 135 of the BP Act, the appellant was ordered to pay fine of Rs.200/- and in default of payment of fine, further Rigorous Imprisonment for a period of seven days.

2.0 The facts in brief of the prosecution case are as under;

2.1 The appellant and deceased – Gangaram Tulsidas Goswami were two amongst the five real brothers. Deceased – Gangaram Tulsidas Goswami was the youngest

of all the brothers. The deceased was earning his livelihood by working in a diamond polishing factory. On the date of incident, i.e. on 26.10.1996, at around 1300 hrs., while the deceased had returned home for the purpose of taking lunch, he felt uneasy and, therefore, informed his wife that he is not desirous to go back for work on that day. However, at that time, the wife of the deceased convinced the deceased to go back to work on the ground that if the deceased didn't return for work, they will not be able to pay the amount of rent of their house. Subsequently, the deceased left for the factory.

2.2 At around 1330 hrs., the appellant went to the house of the deceased and enquired about the whereabouts of the deceased from the wife of the deceased. He was told by the wife of the deceased that the deceased had gone for work to his factory. Thereafter, the appellant proceeded towards the factory where the deceased was working. As a dispute with regard to distribution of ancestral property was in existence between

the appellant and the deceased, the wife of the deceased felt something fishy from the said conduct of the appellant. Therefore, she followed the appellant towards the factory.

2.3 On reaching the factory, she noticed that the appellant was assaulting the deceased and, in the process, had also inflicted two knife blows on the person of the deceased. On noticing the said incident, the wife of the deceased fainted on the spot and the appellant ran away from there.

2.4 At around 1400 hrs., another brother of the deceased – Sureshbhai Tulsidas Goswami, went to the scene of offence, after he came to know about the said incident. On reaching the said place, said Sureshbhai Tulsidas Goswami noticed that the deceased had already expired. Therefore, he proceeded to Bapunagar Police Station for the purpose of recording a complaint against the appellant herein. The Police Inspector of Bapunagar Police Station noted down the same and, thereafter, sent the same to the

P.S.O. for registering the offence. In pursuance of that the P.S.O. registered the complaint as Bapunagar Police Station I-C.R. No. 233 of 1996 for offences punishable u/s. 302 of IPC and Section 135(1) of the BP Act and investigation was taken over by the Police Inspector.

2.5 The Investigating Officer reached the scene of offence and prepared an Inquest 'Panchnama' in the presence of 'Panchas', also prepared a 'Panchnama' of the scene of offence and collected necessary 'muddamal' articles. 'Marnottar' form was filled-up. The dead body of the deceased was sent to Civil Hospital, Ahmedabad along with a 'yaadi' for conducting post-mortem.

2.6 Statements of several witnesses were recorded and further investigation was carried out. At the end of investigation, 'A' Summary Report was filed by the investigating agency. On 04.04.1997, i.e. after about a period of four and a half months, the appellant came to be arrested. Arrest 'Panchnama' was prepared. During the

course of interrogation, as the appellant showed his willingness to produce the weapon – knife used in the commission of the offence in question, the same was recovered after performing discovery 'Panchnama'. Thereafter, the appellant was sent to judicial custody. The `muddamal' knife, clothes worn by the appellant as well as by the deceased at the relevant point of time and other `muddamal' articles collected from the scene of offence were sent to the F.S.L. for examination. On receipt of the F.S.L. Report, PM note and the Medical Report, the same were kept in the investigation file.

2.7 On completion of investigation, charge-sheet was filed against the appellant in the Court of learned Metropolitan Magistrate, Ahmedabad. Since the case was exclusively triable by the Court of Sessions, the learned Metropolitan Magistrate, Ahmedabad committed the case to the City Sessions Court, Ahmedabad and the same was numbered as Sessions Case No. 224 of 1997. As the appellant pleaded not guilty to the said charge, trial was conducted

against him.

3.0 The prosecution has examined in all ten witnesses to prove the guilt against the appellant. PW – 1 Sureshbhai Tulsidas Goswami at Exhibit – 7, PW – 2 Tirubhai Kalyanbhai Patel at Exhibit – 9, PW – 3 Prabhunath Ganesh Tiwari at Exhibit – 25, PW – 4 Rameshbhai Sukhlal Varma at Exhibit – 26, PW – 5 Prakashbhai Govindbhai at Exhibit – 29, PW – 6 Laxmiben Morari at Exhibit – 32, PW – 7 Dr. Vinodkumar Lajjaram Gupta at Exhibit – 33, PW – 8 Jayantilal Ambaram Patel at Exhibit – 34, PW – 9 Manilal Shivabhai Patel at Exhibit – 36, PW – 10 Dashrathsinh Karansinh Chudasama at Exhibit – 38.

3.1 The prosecution has also relied upon several documentary evidences and, more particularly, the evidences in the form of complaint at Exhibit – 8, the discovery 'Panchnama' at Exhibit – 27 and the Post-mortem report at Exhibit – 23.

3.2 On submission of the closing 'purshis', the further statement of the appellant was recorded u/s. 313 of the Code of Criminal Procedure, 1973. Thereafter, on specific question being put to the appellant as to whether he desires to examine anyone as Defence Witness, the appellant cited the names of two persons and, accordingly, the trial Court issued summons to the said two witnesses. Their statements were recorded as DW – 1 & DW – 2 respectively.

3.3 After hearing learned counsel for the respective parties, the learned Addl. City Sessions Judge passed the impugned judgment and order and convicted the appellant for the offences and imposed sentence, as narrated in the earlier part of this judgment. Hence, the present appeal.

4.0 Before proceeding further with the matter, it would be pertinent to note that the appellant was released on furlough leave for a period of 14 days starting from 02.12.2002. However, even after expiry of the said period, the appellant did not surrender to custody and remained

absconding for 1243 days. Thereafter, on medical grounds, the appellant was released on temporary on 16.06.2006 for a period of 15 days. However, after being released on temporary bail, the appellant has not surrendered to custody so far thereby mis-using the liberty granted by the Court. The aforesaid fact is evident from the jail report of the appellant produced by the learned APP, which is taken on record. Since the matter is of 1999 and learned Advocate appearing on behalf of the appellant has showed his willingness to proceed with the matter, the appeal is finally heard today.

5.0 Mr. Chirag Pawar learned Advocate for the appellant has submitted that the prosecution case rests entirely upon the evidence of two witnesses viz. PW – 1 at Exhibit – 7 and PW – 6 at Exhibit – 32, whom it claims to be eye-witnesses to the incident in question. He has contented that PW – 1, who is the brother of the deceased as well as the appellant, cannot be said to be an eye-witness to the incident, as he had reached the scene of offence, after having come to know about the same. Apart from that this

witness had grudge against the appellant on account of some dispute with regard to their ancestral property and, therefore, though he had not witnessed the incident in question, he has deposed against the appellant.

5.1 So far as the evidence led by PW – 6 at Exhibit – 32 is concerned, the same also cannot be wholly relied upon since this witness is the wife of the deceased. He has contented that this witness has reached the scene of offence only at an earlier point of time and that he has not witnessed the offence in question. Learned Advocate has, therefore, submitted that in the absence of cogent evidence on record, the appellant ought not to have been convicted for the offence in question.

5.3 Learned Advocate has submitted that the place where the offence in question took place is an area where several business establishments as well as residential houses are situated. He has contented that being a densely populated area, the alleged incident must have been

witnessed by many other on-goers also but, the prosecution has not examined any such witness/s. PW – 1 & PW – 2, being the relatives of the deceased, they are interested witnesses. He has, therefore, submitted that considering the aforesaid facts, it could be that the prosecution has failed to prove the guilt against the appellant beyond reasonable doubt.

5.4 Learned Advocate has further contented that the discovery 'Panchnama' at Exhibit – 27 also cannot be relied upon as the prosecution has failed to prove that the blood stains found on the knife used in the commission of the offence was that of the deceased. Thus, the F.S.L. Report on record also does not support the case of the prosecution. In above view of the matter, the impugned judgment and order passed by the Court below deserves to be quashed and set aside.

5.5 Learned Advocate has further submitted that if this Court comes to the conclusion that the evidence of PW – 6 is reliable, then the same is required to undergo the litmus test,

as this witness is the wife of the deceased. Learned Advocate has lastly submitted that if this Court is not inclined to allow this appeal, then the Court, by considering the fact that the appellant has languished in jail for a considerable long period of time, may set the appellant at liberty on the basis of sentence already undergone by him.

6.0 Mr. H. L. Jani learned APP has vehemently opposed to the grant of this appeal. He has submitted that it is not disputed that PW – 1 is not an eye-witness to the offence in question but, the fact is that he reached the scene of offence immediately after he received information about the same. He has contented that from the evidence led by this witness, it clearly appears that when this witness reached the scene of offence, PW – 6 was already present at that place and she narrated about the entire incident to this witness. Immediately thereafter, the complaint at Exhibit – 8 came to be filed. He has, therefore, submitted that the evidence led by PW – 6 can be wholly relied upon for recording the conviction of the appellant.

6.1 Learned APP has further submitted that so far as the contention raised by learned Advocate for the appellant that the evidence led by PW – 6 cannot be wholly relied upon is concerned, the same is devoid of any merits in view of the fact that this witness has noticed the incident in broad day-light. Moreover, there would not be any question of mis-identification also, as the appellant is one of her close relatives. Thus, the Court below was completely justified in convicting the appellant for the offence in question.

7.0 We have gone through the entire evidence on record as also the impugned judgment and order passed by the Court below. It is required to be noted that though the prosecution claims that PW – 1 is an eye-witness to the incident in question but, the evidence on record is otherwise. It appears from the record that PW – 1 reached the scene of offence immediately after he came to know about the said incident. When he reached the said place, he found that PW – 6 was already present there and PW – 6 narrated about the

entire incident to him in detail. Thereafter, PW – 1 went to the Police Station and filed the complaint at Exhibit – 8. The evidence led by PW – 1 supports the case of the prosecution to a considerable extent. It may be noted that at the earliest point of time, PW – 1 had gone to the Police Station and filed the complaint at Exhibit – 8 wherein, he has narrated about the entire incident in detail, and more particularly, about the role played by the appellant. Therefore, the evidence led by this witness in the form of his deposition at Exhibit – 7 and complaint at Exhibit – 8 is of considerable importance.

8.0 Undoubtedly, the entire case of the prosecution rests upon the evidence of the wife of the deceased, who has been examined as PW – 6 at Exhibit – 32. In her deposition, this witness has categorically narrated about the incident in question as also the role played by the appellant in detail. Considering the facts of the case as it stands, the only aspect that is required to be considered by this Court is as to whether this witness is an eye-witness to the incident in question.

8.1 The evidence on record shows that before the incident in question took place, the appellant visited the house of the deceased in order to meet the deceased. However, when the appellant was told by PW – 6 that the deceased would be available at his work-place, the appellant proceeded towards the said place. On account of the said conduct of the appellant, PW – 6 became uneasy and since PW – 6 was aware of the fact that the appellant had grudge against the deceased on account of a dispute pertaining to the ancestral property, PW – 6 followed the appellant. On reaching the place where the deceased was working, she noticed that the appellant was assaulting the deceased and that he had inflicted knife blows on the person of the deceased. Having noticed the manner in which the appellant had committed the offence in question, PW – 6 fainted on the spot.

8.2 Thus, from the evidence on record in the form of deposition of PW – 6 at Exhibit – 6, which is supported by the

deposition of PW – 1 at Exhibit – 7, as also the complaint filed by PW – 1 at Exhibit – 8, it is clearly established that PW – 6 is an eye-witness to the incident in question. We find the evidence led by this witness to be wholly reliable and trustworthy. To record conviction in a given case, what is required is cogent and reliable evidence, be it in the form of deposition of a sole witness, rather than the number of witnesses who have led their evidence. In the case on hand, as stated hereinabove, we find the evidence led by this witness, i.e. PW – 6, to be wholly reliable and trustworthy. Thus, merely because PW – 6 is the wife of the deceased, her evidence cannot be neglected on the ground that she is an interested witness.

8.3 Before proceeding further, this Court would like to remark that the role played by the Investigating Officer is not at all satisfactory. When any offence takes place, it is the bounden duty of the Investigating Officer to carry out investigation to the best of his ability. In the present case, the Investigating Officer could have carried out investigation in a

much better manner. The offence in question took place in a densely populated area and the Investigating Officer has not taken any pain to collect evidence of any other independent witness/s who might have noticed the offence in question. Be that as it may, in our opinion, the evidence on record, as discussed hereinabove, is sufficient to record the conviction of the appellant. Nothing contrary has come out from the cross-examination of PW – 6 which may lead us to believe her evidence to be untrue or unreliable.

9.0 So far as the contention raised by learned Advocate for the appellant that PW – 1 has deposed against the appellant as he was having some grudge against him on account of a dispute pertaining to the ancestral property is concerned, it may be noted that no such question was put to this witness before the Court below. On the contrary, this witness is the person who has filed the complainant at Exhibit – 8 and through whom the prosecution has proved the same. However, for reasons best known to this witness, the appellant, at the time of recording the further statement u/s.

313 of the Cr.P.C., requested the Court below to issue summons to two witnesses for examining them as defence witnesses wherein, PW – 1 is one of them. At that point of time, the learned APP appearing before the Court below had brought it to the notice of the Court that DW – 1 is the person who has been examined by the Court as PW – 1 and who is also the complainant in the present case. However, this witness has been examined as DW – 1 and through the evidence of DW – 1 the appellant has tried to come out from the offence in question.

9.1 At this stage, it would be pertinent to point out that the aforesaid practice adopted by the Court below has been deprecated by this Court as well as by the Apex Court. The Apex Court in a recent decision in the case of ***State of M.P. V/s. Badri Yadav & Anr.*** reported in ***2006 Cri.L.J. (S.C.) 2128*** held that under Section 233 of Cr.P.C., the accused can enter upon defence and can apply for the issue of any process for compelling the attendance of any witness in his defence. However, the provisions of sub-section (3) of

Section 233 cannot be understood as compelling the attendance of any prosecution witness examined, cross-examined and discharged, to be juxtaposed as a defence witness. In the present case, the Court below has permitted the appellant to examine his brother, who has deposed as PW – 1 and who is also the complainant, as a defence witness, which is not permissible under the law. Thus, in view of the principle laid down by the Apex Court in the case of *State of M. P. & ors.* (supra), we hold that the deposition of DW – 1 has no evidentiary value.

10.0 So far as the contention raised by learned Advocate for the appellant with respect to reliability of the discovery 'Panchnama' is concerned, it is a matter of record that the 'muddamal' weapon – knife used in the commission of offence was produced by the appellant himself after about five months from the date of incident. Therefore, the blood stains on the said weapon is bound to loose its presence by passage of time and, in that case, it would be difficult to ascertain the blood group from it. Keeping in mind

the aforesaid facts, the evidence led in the form of discovery 'Panchnama' cannot be wholly rejected. However, the fact remains that the 'muddamal' weapon – knife has been produced at the instance of the appellant himself. In that view of the matter, the said contention raised by learned Advocate for the appellant also deserves to be rejected. Apart from that the aspect of homicidal death was not disputed even before the Court below and before this Court. The medical evidence on record in the form of the PM Note at Exhibit – 23 also supports the case of the prosecution. In view of the above discussion, we have no hesitation in holding that this is a case wherein the motive and the role played by the accused – appellant has been proved by the prosecution beyond doubt. We are in complete agreement with the reasonings given by and the findings arrived at by the Court below in the impugned judgment and order and, therefore, find no reasons to interfere with the same. Hence, the appeal deserves to be dismissed.

11.0 In the result, the appeal is dismissed. Office is

directed to sent the Records & Proceedings to the trial Court concerned forthwith.

(R. P. Dholakia, J.) (K. S. Jhaveri, J.)

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